

UNITED STATES OF AMERICA  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

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JAMES GEMELAS, et al., )  
 )  
Plaintiffs, )  
 )  
vs. ) Case No. 1:08CV236  
 )  
THE DANNON COMPANY, Inc., )  
 )  
Defendants. )

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TRANSCRIPT OF PROCEEDINGS HAD BEFORE THE HONORABLE  
JUDGE DAN A. POLSTER, JUDGE OF SAID COURT,  
AND A JURY, ON WEDNESDAY, JUNE 23RD, 2010,  
COMMENCING AT 12:00 O'CLOCK P.M.

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Court Reporter: GEORGE J. STAUDUHAR  
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1 APPEARANCES:

2 Parties present on behalf of Plaintiffs:

3 Timothy Blood, Esq.  
4 Jayne Goldstein, Esq.  
5 Jonathan Stein, Esq.  
6 John R. Climaco, Esq.  
7 D. Scott Kalish, Esq.  
8 Thomas O'Reardon, Esq.  
9 James Gemelas, Esq.  
10 Frank E. Piscitelli, Jr., Esq.

11 Parties present on behalf of Defendants:

12 Angel Garganta, Esq.  
13 Mike Ungar, Esq.  
14 Bruce Friedman, Esq.  
15 Nancy Dowling, Esq.  
16 David Yeagley, Esq.  
17 Ken Strick, Esq.

18 Parties present on behalf of Objectors:

19 Edward Cochran, Esq.  
20 Edward Siegel, Esq.

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P R O C E E D I N G S

THE COURT: We are here on case 1:08CV236, Gemelas, et al versus Dannon Yogurt. We are here for a Fairness Hearing.

Counsel for Plaintiffs are here and counsel for Dannon, and I believe we have some counsel for objectors, and some of the objectors may be present. So the court reporter can hear, I would like anyone who wants to speak to go to the podium where the microphone is, please.

Before the Court is a proposed judgment, final order, and decree resolving this case. I would say by background the parties had done a considerable amount of work on this case before it was filed in this District. It previously was in federal court in California, and the parties did a great deal of discovery.

And then they mediated the case before a retired Federal Judge and had a proposed settlement, which was presented to me. I had several issues. I engaged the parties in a lengthy process, which led to some modifications of the proposed settlement, and they are reflected in the current proposal.

So this has been going on for a long period of time, and I am intimately involved with the process

1 and the contents of the proposed — the amended  
2 stipulation of settlement and the proposed judgment and  
3 all the appropriate orders. So for threshold matters, I  
4 am formally certifying the following class pursuant to  
5 Federal Rule of Civil Procedure 23(b)(3):

6 "All persons who purchased in the  
7 United States the food products marketed and distributed  
8 by Dannon under the brand names of Activia or Danactive,  
9 including any variations formats, or line extensions  
10 thereof" — that's referred to as the, quote, products  
11 unquote "at any time up to the day notice is provided to  
12 the class. Excluded from the class are Defendants,  
13 officers, directors, and employees and those who  
14 purchased the products for the purpose of resale."

15 In other words, this includes consumer  
16 purchasers other than defendants, officers, directors,  
17 and employees.

18 "Second, pursuant to Federal Rule of Civil  
19 Procedure, Rule 23(a), I am finding that the Plaintiff in  
20 this litigation, Mr. Gemelas, is a member of the class.  
21 His claims are typical of the class, and he fairly and  
22 adequately protected the interests of the class  
23 throughout these proceedings in the litigation.  
24 Accordingly, I am hereby appointing Mr. Gemelas as class  
25 representative.

1                   "Third, having considered the factors  
2       setforth in Rule 23(g(1) of the Federal Rules of Civil  
3       Procedure, I am finding that class counsel have fairly  
4       and adequately represented the class for purposes of  
5       entering into and implementing this settlement, and  
6       therefore, I appoint class counsel as counsel to  
7       represent the settlement class members.

8                   "Fourth, Exhibit B sets forth several  
9       individuals who have filed valid requests for exclusion,  
10      also known as optouts." These four individuals are  
11      therefore excluded: Patricia L. Marsheck,  
12      M-a-r-s-h-e-c-k, Margate, Florida; Betty A. Darden,  
13      D-a-r-d-e-n, in Osala, Florida; David W. Geist,  
14      G-e-i-s-t, Sr., in Mariffee, California; and Emojene,  
15      E-m-o-j-e-n-e, Carver in Roxboro, North Carolina. So  
16      those four individuals will be excluded from the class  
17      because they filed valid and timely requests for  
18      exclusion.

19                   Next, I am concluding that the distribution  
20      of the class notice that was accomplished by counsel  
21      constituted the best notice practicable under the  
22      circumstances and fully satisfied the requirements of  
23      Federal Rule of Civil Procedure 23, the requirements of  
24      due process, and any other — Title 28 U.S.C. Section  
25      1715 and any other applicable law. All right.

1           There were a number of objections that were  
2       filed by several objectors and their counsel. There were  
3       some briefs in opposition. The Court has reviewed all of  
4       them. I don't think I need to take up everyone's time.  
5       Going through that now, there may be a couple things I  
6       want to address.

7           One of the things raised was whether it may  
8       be appropriate to withhold some portion of the attorneys  
9       fees, to wait for a couple of things:

10          First, to make sure that counsel completes  
11       all of the work that is left to be done in the same  
12       diligent and conscientious way they have performed their  
13       duties so far and, second, to determine exactly how much  
14       monetary relief will actually go to class members. At  
15       this point we don't know. We have a very detailed claim  
16       procedure set up. I reviewed it.

17          I believe it is fair and appropriate, but no  
18       one really knows how many claims and what the total  
19       dollar amount will be, and certainly, one measure of  
20       determining the fairness and appropriateness of attorneys  
21       fees in a case like this is to measure it against the  
22       monetary relief to the class.

23          It is a little more complicated because here  
24       there is both monetary and non monetary relief, so I am  
25       not suggesting that the only measure is the monetary

1 relief but certainly that is one measure.

2 So I guess my thought was the attorneys  
3 fees, the settlement provides for attorneys fees up to  
4 \$10 million dollars, and my preliminary thought would be  
5 to award \$7 million dollars at this point and then  
6 consider additional attorneys fees when I make sure,  
7 first, everything has been concluded in the MDL and I am  
8 able to see what — how much monetary relief was obtained  
9 for the class, and then I will consider the balance. So  
10 I guess that was a tentative thought.

11 So that was one issue, and the second one  
12 that was raised by the objectors in the stipulated  
13 settlement, the parties have agreed that if the total  
14 amount of defendants payments is less than \$35 million  
15 dollars — and that includes attorneys fees and, well, I  
16 don't know, does that include the attorneys fees, or is  
17 that exclusive of attorneys fees, that total amount of  
18 payments?

19 MR. BLOOD: That's inclusive.

20 THE COURT: All right. That was my thought.  
21 The total amount is less than \$35. It could go as high  
22 as \$45 million, depending on the amount of claims, but if  
23 this provision — and it is Roman Numeral IV, capital  
24 A(3) (a), provides that "the total amount of payments is  
25 less than \$35 million dollars, then Defendant Dannon

1 shall donate products having a total value equal to the  
2 difference between the \$35 million and the amount of  
3 payments, pursuant to the cy pres doctrine to be  
4 distributed to one or more charities that help feed the  
5 poor."

6 A question was raised as to how this product  
7 would be valued, and I guess there are two ways: We  
8 could use the wholesale value or the retail value. The  
9 Court's preliminary inclination is to use the wholesale  
10 value but, also, to credit Dannon with any distribution  
11 or transportation expense incurred in transporting the  
12 products from Dannon's facilities to the charities that  
13 would receive the product.

14 So I guess I would like to hear from the  
15 Plaintiffs, from Dannon, and from any of the objectors on  
16 those two issues that I have raised.

17 MR. BLOOD: Good afternoon. Timothy Blood  
18 for the Plaintiffs.

19 THE COURT: Yes, Mr. Blood.

20 MR. BLOOD: First of all, I think it is  
21 perfectly appropriate for the Court to make an initial  
22 award of attorneys fees and then determine the remaining  
23 amount at a later time after the settlement concludes, we  
24 certainly have no objection to that, your Honor.

25 And I assume that any later discussion of



1 the amount would be until — would wait until after the  
2 process concludes.

3 THE COURT: That's my suggestion, Mr. Blood,  
4 that we wait until what we will call the claims process,  
5 so we will be able to know the total value, the economic  
6 value that is going to the class, certainly, along with  
7 all the other factors.

8 MR. BLOOD: Okay. Then we will hold off  
9 argument until then.

10 With regard to wholesale versus retail, if  
11 the Court determines that it would be wholesale value, I  
12 think the parties had an understanding they would be  
13 retail value, but if it was wholesale value, then I  
14 certainly think it would be appropriate to include costs  
15 of distribution, transportation primarily because Dannon  
16 doesn't distribute to these types of entities.

17 THE COURT: Right. Well, I would definitely  
18 include that. The provision doesn't — it doesn't  
19 specify it, so there may have been discussion among the  
20 parties, but this was my preliminary thought, but I would  
21 certainly include any distribution or delivery costs  
22 entailed by Dannon in getting the food products to the  
23 charities.

24 MR. BLOOD: And with regard to sort of a  
25 related issue of how that is all to be done, the parties

1 have been discussing it, and pursuant to the way in which  
2 cy pres awards are distributed anyway, at the close of  
3 the claims process, the parties intend to work on a  
4 distribution plan, a detailed distribution plan in this  
5 case and present it to the Court.

6 Obviously, that would detail based on how  
7 much value there is, based on how much product has to be  
8 distributed, who the awardees, the recipients will be,  
9 the amount, the timing and a distribution plan in enough  
10 detail to satisfy the Court, and that would obviously be  
11 done later on after we know how much money we are dealing  
12 with.

13 THE COURT: Okay. I guess I should have  
14 said, I know the objectors raised an issue as to whether  
15 this was an appropriate cy pres recipient. I have  
16 concluded that it is. It is an appropriate use of  
17 cy pres. The claims process ensures, quite frankly, that  
18 all the claimants, you know, even above the \$35 million,  
19 potentially up to \$45 million, the claims would be  
20 honored.

21 So we are only talking about the situation  
22 where the claims don't reach the \$35 million total  
23 threshold, and at that point, the claimants will have  
24 received whatever monetary relief they are entitled to,  
25 and I think distribution of food products to those

1 individuals in this country who are hungry is  
2 appropriate. So I am making that finding.

3 MR. BLOOD: And we would agree and certainly  
4 more appropriate than sending yogurt product to the  
5 Better Business Bureau, which is what the objectors seem  
6 to suggest, which I think would be —

7 THE COURT: Well, I don't think  
8 they suggested sending yogurt to the Better Business  
9 Bureau. I think the idea was some sort of monetary  
10 contribution to the Better Business Bureau or entities  
11 like that that provide benefit to consumers, and there  
12 would be nothing inappropriate about that.

13 I don't think they were suggesting sending  
14 the yogurt there. It was making a monetary compensation  
15 to agencies, and there would be nothing wrong with that.  
16 But there would be a great benefit to providing food to  
17 people in need, and it would be appropriate. So I am  
18 making that finding.

19 MR. BLOOD: And I have nothing else unless  
20 your Honor — oh, expenses, also.

21 THE COURT: Oh, I should — I am going to  
22 award the expenses. I find the amount set forth in the  
23 filings is reasonable and appropriate. It is  
24 \$598,578.44, and I shall order those paid.

25 MR. BLOOD: And just to be clear, and those

1 are paid at the same time that the \$7 million will be  
2 paid?

3 THE COURT: Yes.

4 MR. BLOOD: Thank you, your Honor.

5 And I have nothing else unless you have  
6 questions for us.

7 THE COURT: No. Yes, Mr. Ungar.

8 MR. UNGAR: Thank you, your Honor. I think  
9 I will be the briefest I have ever been in this  
10 courtroom. First, I want to thank the Court for its  
11 assistance throughout these matters. We have no  
12 objection or position with respect to the attorneys fees  
13 issue.

14 With respect to the distribution of product,  
15 we have no objection to the Court's suggestion that it be  
16 valued at a wholesale price with full credit to Dannon  
17 for all of the distribution costs and administration  
18 costs that are associated with this process, which is  
19 obviously out of the ordinary course of its normal  
20 business.

21 And then, finally, I would just point out  
22 that we will continue to work with Plaintiffs' counsel  
23 under the continuing jurisdiction and supervision of this  
24 Court with respect to the product distribution since it  
25 is clear that is going to materialize, and we will report

1 to the Court on a timely basis with a distribution plan.

2 And thank you.

3 THE COURT: Thank you, Mr. Ungar.

4 MR. UNGAR: Unless you have any questions.

5 THE COURT: No. That's fine.

6 Do any of the objectors or counsel for the  
7 objectors wish to speak on any of these points?

8 MR. COCHRAN: Yes, your Honor. Good  
9 afternoon. Edward Cochran for objectors Falkner,  
10 Cochran, Cannata, Loeffler, Richey, Price, Henry, and  
11 Lodwick.

12 Your Honor's addressing some of the  
13 objections will very much shorten what I have to say.  
14 Obviously, we agree with the addressing the two issues,  
15 your Honor. I would have only three points to make  
16 supplemental to that.

17 One, I would ask the Court to consider that,  
18 as this settlement is nothing but a claims made  
19 settlement or insurance against what claims might be made  
20 and that indeed there might be very few claims. There  
21 might be many more claims than I think as well.

22 I mean, frankly, I don't know any more than  
23 anyone else in this room, but I do know from many other  
24 cases I have been in of 1 percent claim rates and  
25 2 percent claim rates and so on; that in light of that,

1 that the parties and the Court should consider some kind  
2 of minimum cash payment, whatever it might be. And I  
3 know in our written suggestions we suggested \$25 million  
4 dollars, which is now zero. There is no minimum payment  
5 of cash whatsoever, other than \$10 million to the  
6 attorneys. That is the only cash that we know that will  
7 be paid.

8 THE COURT: Well, to whom would the cash be  
9 paid?

10 MR. COCHRAN: Your Honor, if there were a  
11 minimum you mean?

12 THE COURT: If there were —

13 MR. COCHRAN: If there was a minimum of  
14 \$10 million dollars, say, that should go to the cy pres,  
15 Better Business Bureau, whoever it might be in lieu of  
16 yogurt products, which would be of much more utility to  
17 any charitable or public interest organization. If such  
18 recipients were in this room, I feel confident that they  
19 would agree with me 110 percent.

20 The second suggestion, your Honor —

21 THE COURT: Well, I would just say,  
22 Mr. Cochran, I understand your point, but the only  
23 charities that are going to be receiving Dannon's food  
24 products are those that can use those products. We are  
25 not contemplating Dannon loading up their trucks full of

1 yogurt, driving around and leaving trailers full of  
2 yogurt in places. I mean it is going to be efficient and  
3 effective, and they will distribute enough of their  
4 product to reach the values required when we see what the  
5 monetary claims are that are paid and to as many  
6 charities as needed to make sure that all the food can be  
7 received, stored, and distributed, so there is not going  
8 to be any wasted food.

9 So in my view — presumably the charities —  
10 if you give cash, you know some of us do to Cleveland  
11 FoodBank, do, and they then purchase food, or they give  
12 the money to the subentities that buy the food. It is  
13 all converted into food. Here it is already in useful  
14 food products.

15 It is just a question of making sure that  
16 only so much is distributed because, of course, it is  
17 perishable, that it can be used in a timely fashion, and  
18 that is why there may be significant distribution  
19 expenses because we are not talking about, you know,  
20 canned foods that might have a shelf life of six months  
21 or more. So there will be a lot of mechanics, but I am  
22 confident the food products will be used.

23 MR. COCHRAN: I understand. And of course,  
24 that's a good point, your Honor. I am only trying to  
25 address what if, for example, there were not even a

1 million dollars claimed in money to the class. There  
2 should be some minimum in that event.

3 THE COURT: Okay.

4 MR. COCHRAN: And I continue — and we would  
5 like the permission of the parties and the Court, if it  
6 is available for the objectors, to stay involved in the  
7 case so as to represent some other monitoring force in  
8 addition to the Court of the details of what the Court  
9 has outlined as what I think is the best intentions..

10 THE COURT: Well, I don't think there is any  
11 additional monitoring or oversight. We have the lawyers,  
12 but ultimately, the monitoring and oversight is me. And  
13 I think I can accomplish the oversight myself, but I  
14 appreciate the offer.

15 MR. COCHRAN: Your Honor, the second point,  
16 in light of the Court having addressed my objections is  
17 what would happen to the money, if any, if attorneys fees  
18 ultimately are less than \$10 million dollars. We know  
19 the Defendant is prepared to pay \$10 million dollars, and  
20 in the end were the claims, the amount claimed by the  
21 class to be very low and possibly the Court were to order  
22 that the fees would not exceed lodestar or \$7 million,  
23 whatever, we would like to address the issue of whether  
24 that money should simply disappear back into the pockets  
25 of the Defendant, whether it be \$3 million or whatever or



1 whether that money should be addressed by the Court as a  
2 potential settlement.

3 THE COURT: Well, Mr. Cochran, as I  
4 understand it, that differential, if there is one and if  
5 it arises, would be converted into cy pres food  
6 distribution because Dannon is committed to pay money  
7 and/or food valued at the wholesale price up to \$35  
8 million dollars.

9 And at this point none of us know what the  
10 components will be. We don't the know — the agreement  
11 contemplates possibly claims well over \$25, \$30 million.  
12 We don't know. They could be, they could be small, no  
13 clue, but that's covered by the agreement. Just say  
14 hypothetically, if we have got \$20 million dollars in  
15 claims and the Court doesn't award any attorney fees  
16 beyond the \$7, you know, there is about \$8 million  
17 dollars of food.

18 If the Court orders \$10 million dollars of  
19 attorneys fees and we have got \$20 million dollars of  
20 claims, that's about \$5 million of food. If it is only a  
21 small number of claims, well, we have many, many millions  
22 of food that is distributed, but the money, under no  
23 circumstances will any reduction in attorneys fees inure  
24 to the benefit of Dannon.

25 If it would, that would have been a failure

1 of the process, and that isn't happening.

2 MR. COCHRAN: Well, of course, your Honor is  
3 correct, those are the terms of the settlement, but I  
4 think Dannon is much more wanting to expend product than  
5 they are cash, and I am just addressing the fact that  
6 pursuant to the clear sailing provision, they are willing  
7 to pay up to \$10 million dollars in cash, and since they  
8 are, I am simply interposing an objection, your Honor,  
9 that would address whether any reduction in attorneys  
10 fees would be conferred only into distribution of  
11 additional product as your Honor has described or whether  
12 the cy pres can be through objectors in this case, have  
13 the opportunity to seek a cash contribution, that's all  
14 and if your Honor disagrees —

15 THE COURT: So it would be a cash cy pres  
16 contribution —

17 MR. COCHRAN: Correct.

18 THE COURT: — to someone.

19 All right. Well, that's sort of related to  
20 your prior objection, Mr. Cochran. I understand your  
21 point, but I have concluded the mechanism the parties  
22 have come to is fair and appropriate, but I understand  
23 the objection.

24 MR. COCHRAN: Thank you, your Honor. The  
25 final point is, as to the lodestar, your Honor has chosen

1 to distribute immediately \$7 million dollars, which is  
2 roughly the lodestar. Mr. Seigel will address in a  
3 moment our belief that the actual attorney time, as  
4 compared to clerks and investigators and so forth that  
5 are being included in the lodestar, the actual attorney  
6 time that has been submitted in the lodestar is, at  
7 least, a couple million dollars less than \$7 million  
8 dollars.

9 And we would like to put that into the  
10 record, and if the Court would like to address that, but  
11 I will let Mr. Seigel address the detailed numbers of  
12 that lodestar. With that, I shall sit down.

13 Thank you, your Honor.

14 THE COURT: Thank you, Mr. Cochran. All  
15 right.

16 Mr. Seigel?

17 MR. SIEGEL: Thank you, your Honor.

18 Edward Siegel representing the same parties that  
19 Mr. Cochran represents and also acting as co-counsel to  
20 Ken Nelson who represents Denise Fairbank and  
21 Darrell Palmer representing Steven Cope. Ms. Fairbank  
22 and Ms. Cope are resting on their written objections and  
23 have nothing further to add.

24 As Mr. Cochran indicated, in our objections,  
25 we talk about the fact that under the recent Kenny A

1 decision by the Supreme Court, that the lodestar — and  
2 only the lodestar — is the appropriate measure for  
3 attorneys fees in class actions.

4 I did a quick analysis of the attorneys —  
5 of the fee request and noted there was a case in Georgia,  
6 which was the Carpenter's Health and Welfare Benefit  
7 versus the Coca Cola Company, in which Kaufman Stoia,  
8 which was the predecessor to Robbins Geller, was  
9 involved.

10 In that case, the Court, Lois B. Hunt, said  
11 that you cannot include in your lodestar investigators,  
12 accountants, other people who are just staff. These are  
13 overhead, and they can not be included in lodestar.

14 And yet, in the affidavit that was submitted  
15 by Jonathan Stein of the \$4.6 million dollars claimed in  
16 lodestar only \$2.5 is for partners, associates, of  
17 counsel, and paralegal. That leaves \$2.1 million dollars  
18 for document clerks, interns, shareholder relations,  
19 information tech, and investigators, forensic accountants  
20 and others. These, according to, as I said, the Coke  
21 case, that's overhead. That is the responsibility of the  
22 law firm and should not be charged to the class.

23 If you subtract that from the \$7  
24 million-dollar lodestar, you take off \$2.1 million for  
25 these — and these are rough numbers — the Poiscitelli

1 firm added about \$25,000 in similar non reimburseable  
2 costs and Shepherd Finkelman had about \$250,000 in such  
3 costs, so you really get a lodestar of \$4.5 million  
4 dollars.

5 We believe that that should be the lodestar,  
6 and that should be the amount that is awarded rather than  
7 the \$7 million dollars that they claim. I have nothing  
8 further, your Honor.

9 THE COURT: Mr. Siegel, what document has  
10 that?

11 MR. SIEGEL: I am looking, your Honor, at  
12 document 67-3 filed on June 9th. It is 2 of 98. It is a  
13 declaration of Jonathan M. Stein in support of the  
14 Plaintiffs motion for final approval of settlement for  
15 attorneys fees and expenses and response to objections,  
16 and it is page ID No. 1097 is where it begins, but I am  
17 looking in particular at pages 1099, 1100, and 1101, and  
18 54 percent of the \$4.6 million dollars is for partners  
19 associates of counsel and paralegals. The rest is for  
20 others.

21 THE COURT: Well, project attorney sounds —  
22 I assume those are attorneys.

23 MR. SIEGEL: Your Honor, project attorneys  
24 are probably — this is something that has been  
25 criticized in many class action settlements — these are

1 contract employees who may get \$35 to \$50 an hour, and  
2 some of them are billed out at \$515 an hour.

3 The first one is Steven Allen, \$515. There  
4 is no evidence as to how much these people are paid.  
5 They basically review documents, and in the Xerox case,  
6 Carlson versus Xerox in the Second Circuit and the Tyco  
7 case in New Hampshire, several of these contract  
8 attorneys submitted affidavits as part of the public  
9 record saying they were not supervised.

10 They basically did objective coding. They  
11 did not do lawyer-like work for perhaps a third of their  
12 time, and I think there are many cases that say just  
13 because the lawyer does the work, if it is ministerial in  
14 nature, he should not be rewarded at his full billable  
15 rate, but the others —

16 THE COURT: But the real issue is, what you  
17 are suggesting is if they are ostensibly billed at \$2,  
18 \$300 and more dollars an hour, they are getting paid a  
19 fraction of that. That would be inappropriate. If they  
20 are contract attorneys, this should be the contract  
21 amount.

22 MR. SIEGEL: Precisely, your Honor.

23 THE COURT: So I assume it is.

24 MR. SIEGEL: No, your Honor. I don't  
25 believe that these people are paid \$515 an hour. I have

1 no evidence — there was no evidence in the record  
2 indicating how much these people were actually paid, but  
3 I would be very surprised if they were actually paid at  
4 between \$290 and \$515 an hour.

5 THE COURT: I guess maybe I should find out  
6 because there is a large — forensic accountants and  
7 shareholder relations is really almost negligible  
8 compared to the total, but there is a large item for  
9 project attorney. It looks like it may exceed a million  
10 dollars if I add up all those entities. Who can  
11 enlighten me about project attorneys?

12 MR. BLOOD: I can, your Honor.

13 THE COURT: Yes, Mr. Blood.

14 MR. BLOOD: The project attorneys were hired  
15 because of the large number of documents that we had to  
16 review for deposition and trial preparation in a very  
17 short amount of time based on the schedule set by the  
18 Central District of California.

19 Their lawyers, the rates are based on their  
20 number of years in practice, and they are generally lower  
21 rates than what an associate would be billed out at or a  
22 partner would be billed out at a firm. It depends on the  
23 project lawyers. Steve Allen is essentially a salaried  
24 person. He receives a salary amount like an associate  
25 would, and then he is billed out at an hourly rate like

1 an associate or partner would.

2 And then some of the other people because of  
3 the amount of documents we had to review in a very short  
4 amount of time were people paid on an hourly basis. I  
5 don't recall what the amount of hourly rate was, but it  
6 was certainly less than what the billable rate was  
7 because that's how law firms make money, is they pay  
8 their attorneys less money than what they bill them out  
9 at, and that way it covers overhead and —

10 THE COURT: Well, I understand and that's  
11 for employees, but normally, if these are contract  
12 employees, you have very little overhead for them. You  
13 may not pay benefits. You may not have all the  
14 associated overhead you have with an employee.

15 MR. BLOOD: And with the Kaufman-Stoia  
16 firm — well, it depends. I mean, what happens,  
17 particularly with a bad economy is at the Kaufman-Stoia  
18 firm and then my new firm, there are people who will work  
19 part-time but essentially year round on projects doing  
20 document review. The nature of our business is document  
21 intensive. It is subjective coding that needs lawyers to  
22 look at, and those do have overhead costs.

23 We, of course, didn't brief this issue  
24 because Mr. Siegel never raised it. So we are a bit  
25 sandbagged. It is not like Mr. Siegel noticed this for



1 the first time. His practice is to follow the  
2 Kaufman-Stoia firm around and make the same objections  
3 over and over again. We were not expecting this to be  
4 addressed, but if we had, we certainly would have  
5 provided the Court with case law justifying the practice.

6 But some of these lawyers were hired just  
7 for this project, but a number of these lawyers are  
8 essentially on staff all the time and go from case to  
9 case as needed. So there are overhead costs associated  
10 with those folks. Steve Allen has a desk and phone and  
11 e-mail and all those other types of things.

12 THE COURT: All right. Well, I am satisfied  
13 they are lawyers. The billing rates were quite high for  
14 everyone, but I know the billing rates are quite high,  
15 and they are higher outside of Cleveland than in  
16 Cleveland, and a lot of this litigation was conducted in  
17 California. I think most of the actual litigation was in  
18 California.

19 By the time it got to Ohio, we weren't  
20 taking depositions, documents had already been gone  
21 through, so this was primarily California. I know rates  
22 are much higher in California.

23 Well, there is, you know, this small amount  
24 for information techs and a total of maybe \$10,000 for a  
25 few interns, a little bit for document clerks. I find

1 that it is a very, very, very small amount of the \$7 plus  
2 million dollars. So I don't consider it a major issue in  
3 awarding reasonable attorneys fees.

4 All right. I guess lastly, the objectors  
5 had made a motion or request for attorneys fees for them.  
6 And the last thing I am interested in is sort of  
7 satellite litigation over this but no amount was  
8 suggested. I mean, I have considered everything the  
9 objectors have said. I rejected most of it but  
10 incorporated a couple of their points in some of the  
11 modifications I have made.

12 So Mr. Siegel, Mr. Cochran, now, the  
13 issue — you raised it — have you determined what you  
14 would ask for.

15 MR. COCHRAN: May I, your Honor.

16 THE COURT: Yes?

17 MR. COCHRAN: Your Honor, in my written  
18 objections, I have not requested any fee.

19 THE COURT: All right. Okay.

20 Well, I guess, Mr. Siegel was? I thought  
21 from one of you, I guess it was Mr. Siegel.

22 MR. SIEGEL: Yes, your Honor. That was in  
23 the objection filed by Ken Nelson, and I believe that our  
24 feeling is that if we have contributed to the Court's  
25 understanding of the entire case and have helped clarify

1 some things that were perhaps somewhat murky, that we  
2 should be entitled to a fee based on the Court's — in  
3 the Court's discretion. There is no particular number  
4 that we have thought of. It could, of course, be  
5 lodestar. It could be —

6 THE COURT: Well, in terms of hours  
7 expended, how many hours did you expend? See, I wouldn't  
8 know that, so it would be inappropriate for me to just  
9 guess.

10 MR. SIEGEL: And, your Honor, rather than me  
11 guess Mr. Nelson's time, with the Court's permission, I  
12 would like to defer that for a few hours to call  
13 Mr. Nelson and check. I know what my time is, and I can  
14 find out Mr. Palmer's.

15 THE COURT: I will tell you what,  
16 Mr. Siegel, I am not saying what I will do. I don't know  
17 what I will do, but it is appropriate for me to  
18 consider — I am not going to reject a request before it  
19 is made or sort of guess what it is because that would be  
20 appropriate.

21 If you are requesting attorneys fees and now  
22 that you know essentially what the Court has done, if you  
23 want to make a request, you can make one and document it,  
24 and I will consider it. And I will let obviously the  
25 Plaintiffs and Dannon file anything they wish, and we

1 will deal with it in an orderly fashion, and I will make  
2 a decision on it. I think that's the way to do it.

3 MR. SIEGEL: Thank you, your Honor.

4 THE COURT: Rather than having people do it  
5 on the fly, it is better to do it orderly.

6 MR. SIEGEL: How quickly would you like  
7 that, your Honor?

8 THE COURT: I would say within a week.

9 MR. SIEGEL: Fine. Within seven days I will  
10 have something to you, your Honor.

11 THE COURT: Okay.

12 MR. SIEGEL: Thank you.

13 THE COURT: All right. Well, I think we are  
14 pretty well concluded.

15 I have considered all of the objections,  
16 most have been rejected, but I have incorporated some of  
17 them in my rulings. I would say this has been a very  
18 complex class action because, first, the allegations were  
19 very complex, and litigation was very uncertain.

20 I don't know how ultimately this would have  
21 been decided had it been litigated because it had —  
22 Dannon had made some claims about the — what I will call  
23 the health benefits of some of its products, and the  
24 Plaintiffs had challenged those representations, and  
25 there has been a lot of scientific studies about the use

1 of Dannon's products.

2 The parties briefed me on this. I read a  
3 lot of material. So the outcome was quite uncertain, and  
4 that's why a lot of time, legal time was spent and why  
5 the attorneys' are high, and the outcome was uncertain.  
6 And so it made sense for the parties to settle this case.  
7 It made sense for the Plaintiffs to settle it.

8 Again, because one of the complexities was  
9 that Dannon had offered a moneyback guarantee for many of  
10 its products that were the subject of the dispute if  
11 within, I believe, two weeks Plaintiff didn't note some  
12 improvement in his or her general feeling, wellbeing,  
13 whatever, he or she could get his or her money-back.

14 So we had that, and it was never clear how  
15 many Plaintiffs felt that their general health or comfort  
16 or wellbeing was improved or how many didn't and exactly  
17 what the science of Dannon's claims were, so that would  
18 have been very protracted and uncertain.

19 Second, there is a very important part of  
20 the relief, the — what I will call the injunctive  
21 portion — that Dannon made some significant  
22 modifications in its advertising and packaging for a  
23 period up to three years, and the Court spent a lot of  
24 time with the parties on that because I was concerned  
25 about that and about how it would appear if a settlement

1 with a Federal District Court Judge's name on it approved  
2 certain language, that someone might say, well, it is  
3 essentially Court approved. So we spent a lot of time  
4 with that, and there was back and forth, and there were  
5 compromises.

6 So I am saying all of this to highlight,  
7 one, the complexity of this case, the uncertainty, the  
8 outcome had the case been litigated, and that's why I  
9 think the settlement is fair and appropriate. It does  
10 provide monetary relief, and Plaintiffs can get a modest  
11 monetary relief without just on their say so.

12 It certainly is appropriate to require some  
13 proof of purchase for anything over a small base level.  
14 I think any class action settlement I have ever seen has  
15 required some proof of purchase. That's to avoid fraud.  
16 So I don't think the requirements here are onerous or any  
17 different than the class action settlements I have seen.

18 So all that is by way of saying that I think  
19 the settlement is fair and appropriate, and I am  
20 approving it with a couple of modifications that we dealt  
21 with today.

22 So I am also going to award that the  
23 Plaintiff, Mr. Gemelas, and any Plaintiff who has been  
24 deposed is entitled to an incentive award of \$7,500, and  
25 any Plaintiff who has not been deposed is entitled to an

1 incentive award of \$1,000, and I am hereby dismissing  
2 with prejudice this action and all released claims  
3 against each and all released persons and entities and  
4 without cost to any of the parties as against the others.

5 So I think I covered everything I need to  
6 cover, but this is fairly complex. So, Mr. Blood,  
7 Mr. Ungar, any other counsel, is there anything that you  
8 feel I need to cover on the record that I haven't  
9 covered?

10 MR. BLOOD: I don't believe so, your Honor.

11 MR. UNGAR: Ditto.

12 THE COURT: Mr. Cochran?

13 MR. COCHRAN: There is one clarification,  
14 your Honor, with respect to the request.

15 THE COURT: Yes, Mr. Cochran.

16 MR. COCHRAN: With reference to the decision  
17 of future attorneys fees, is the Court requiring  
18 disclosure of, A, the claims data and, B, the rates and  
19 payments for project attorneys?

20 THE COURT: Well, I had the rates for  
21 project attorneys.

22 MR. COCHRAN: I mean, the rates they are  
23 actually paid.

24 THE COURT: Well, I believe that many of  
25 these people are actually employees. All right? They

1 are full or part-time employees. So they are essentially  
2 treated like associates. So the rates seem to be in line  
3 with associates. They are actually in most cases less  
4 than associates.

5 So considering it is California, that will  
6 just — I will just go with that. I am going to require  
7 a report, and I think I would see it, a report as to the  
8 total amount of claims, how that process has gone, and  
9 then what the total amount is and what, if any, food  
10 contribution.

11 So I would just expect class counsel to make  
12 that report to me at the end of the claims process, and  
13 then I will consider any future application for attorneys  
14 fees.

15 MR. COCHRAN: Your Honor, will that claims  
16 data be made available to objectors?

17 THE COURT: Well, it will be filed. I will  
18 ask Mr. Blood to file it, and at the end of the  
19 process — I don't need every minute detail, but just say  
20 we had X claims totaling X dollars. And so those have  
21 been paid, and Dannon is going to pay, you know,  
22 distribute the amount of food. So that's what we will  
23 have. And it will be filed, and anyone can see it.

24 MR. COCHRAN: That's perfect, your Honor.  
25 Thank you.



1 THE COURT: Then I want to thank all counsel  
2 who have appeared today and have worked very hard on  
3 this. I was glad I was able to assist the parties,  
4 complete the complex settlement process you had  
5 engaged in and with the substantial help of retired  
6 Judge Tevrizian, and I am glad we were able to move  
7 forward on this. So I thank everyone for their hard work  
8 and for appearing today. So with that, we are adjourned.

9 MR. CLIMACO: Thank you, your Honor.

10 THE COURT: And Mr. Climaco, I hope your  
11 neck improves.

12 MR. CLIMACO: Thank you, your Honor. It is  
13 improving considerably.

14 (Hearing concluded at 1:09 p.m.)

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C E R T I F I C A T E

I, George J. Staiduhar, Official Court  
Reporter in and for the United States District Court,  
for the Northern District of Ohio, Eastern Division,  
do hereby certify that the foregoing is a true  
and correct transcript of the proceedings herein.

s/George J. Staiduhar  
George J. Staiduhar,  
Official Court Reporter

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